

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996)
)
Amendment of Rules Governing Procedures)
To Be Followed When Formal Complaints Are)
Filed Against Common Carriers)

CC Docket No. 96-238

COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits the following comments in response to the Common Carrier Bureau's ("Bureau") *Public Notice* regarding accelerated docket procedures for formal complaints.^{1/}

Jointly with the Commission's Competition Enforcement Task Force ("Task Force"), the Bureau is examining an "Accelerated Docket" for complaint adjudication which (1) provides for the presentation of live evidence in a "hearing-style" process and (2) can resolve the complaint within 60 days.^{2/} The *Public Notice* proposes initially to limit accelerated docket procedures to "issues of competition in the provision of

^{1/} Common Carrier Bureau Seeks Comment Regarding Accelerated Docket for Complaint Proceedings, *Public Notice*, DA 97-2178 (rel. Dec. 12, 1997) ("*Public Notice*").

^{2/} *Public Notice* at 2.

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telecommunications services," and seeks comment on this proposal.^{3/} The Bureau and the Task Force also seek comment on the extent to which the recently-revised formal complaint rules should apply to the Accelerated Docket and ask commenters to identify any specialized procedures or requirements that may be necessary to resolve certain complaints more expeditiously.^{4/}

INTRODUCTION AND SUMMARY

As the Commission and the industry move to an environment of increased competition among common carriers, the formal complaint process will become a more and more important component of the Commission's regulatory scheme. The growing number of participants in the dynamic telecommunications industry, combined with the decreasing role of day-to-day regulation, seems likely to bring increasing reliance on formal complaints as a means of Communications Act interpretation and industry dispute resolution. In particular, the painstaking task of creating competition in the local services market will present a multitude of issues, many of which will be presented in formal complaints, concerning a carrier's duties and obligations to open markets to competition and to compete fairly. Consequently, CompTel welcomes the Bureau's and the Task Force's focus on formal complaint processing alternatives that may advance the Act's pro-competitive goals fairly and expeditiously.

^{3/} *Id.* at 3.

^{4/} *Id.* at 2; see *Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, FCC 97-396 (rel. Nov. 25, 1997) ("*Complaint R&O*").

CompTel supports the concept of creating an Accelerated Docket for specified classes of complaints. Accelerated procedures are best suited for, and most needed in, resolving disputes concerning the obligations of carriers to eliminate barriers to entry, to facilitate competition through resale and the use of essential network facilities, and to treat all carriers on a nondiscriminatory basis. Thus, CompTel suggests that only complaints within the Commission's jurisdiction alleging violations of Sections 251, 252 and 271-275 initially be eligible for the Accelerated Docket.

Participation in the Accelerated Docket should be voluntary for the complainant, provided the case meets the applicable eligibility criteria. As with its consideration of rules to address complaints generally, the Commission faces the challenge of balancing several objectives. On the one hand, it is important to promote speedy, efficient and administratively manageable procedures for resolving competition-affecting issues and to provide consistent and clear enforcement of the Act's pro-competitive rules. At the same time, however, it also is important to ensure that formal complaints are not so truncated that they fail to provide complainants a meaningful opportunity to present their cases or that they impose undue hardships on the complainant. In some cases, the abbreviated procedures necessary to accommodate an Accelerated Docket case may not be appropriate for resolution of the precise claim asserted. In such instances, the complainant should be permitted to decide whether to "opt-in" to the Accelerated Docket or have its complaint heard in the normal course of the Commission's processes.

In addition, the Bureau and the Task Force should explore ways to expand interim relief where appropriate and to expedite complaint processing while not sacrificing the effectiveness of the complaint process.

A. The Need For an Accelerated Docket

There are many advantages to the use of an Accelerated Docket in competition-affecting cases. Most importantly, accelerated consideration of a complaint can be critical when the issue involves a new entrant's ability to compete. If essential services are being withheld, if competitive safeguards are being violated, or if discriminatory treatment is occurring, the offending activity should be identified and corrected as expeditiously as possible. Prompt resolution not only will inure to the benefit of the parties to the complaint, but also to the benefit of the public interest and all other entities that may be similarly situated.

Moreover, live testimony, and the concomitant right of cross-examination, is a substantial benefit in dispute resolution. A hearing providing the ability to cross-examine witnesses is a hallmark of our judicial system. Moreover, the presentation of witnesses in a hearing-style adjudication is a staple of many state commissions' procedures as well. The reason is clear. Cross-examination provides an unparalleled opportunity to test witnesses' credibility, to clarify issues, and to evaluate the strength of a party's evidence. It thus is a most effective truth-finding device, and is far superior than paper pleadings and briefs at addressing such issues.

In addition, certain types of cases seem particularly suited to the hearing procedures contemplated in the *Public Notice*. For example, allegations of discriminatory treatment might best be addressed through live testimony. More often than not, a complainant alleges that a preference is being conferred when a carrier is providing service to itself and the complainant, but those services differ in one or more ways. The complainant thinks those differences are significant and detrimental to it, while the defendant claims they are immaterial. Live testimony (with the opportunity for cross examination) will allow a party to

test those differences in detail, to present hypothetical situations for comparison, and to illustrate the significance of the differences. Without a hearing involving live testimony, the Commission will find it much more difficult and time consuming to sort these issues out based solely on the parties' briefs and written documentation.

Finally, use of an Accelerated Docket for certain types of complaints can result in a decisionmaking body with specialized expertise and can further the purposes for which the Task Force was created.^{5/} Commission counsel and staff addressing issues eligible for the Accelerated Docket will gain valuable expertise in these areas, which can be drawn upon in successive cases involving similar issues or concerns. It also would provide a degree of consistency in interpretation that might not be achieved otherwise. In light of the many uncertainties now surrounding the 1996 Act, a uniquely-qualified "competition court" could be one of the most effective ways in which the Commission can carry out its mandate to promote competition in all telecommunications markets.

These benefits cannot be achieved if the Accelerated Docket is open to all types of cases and all issues. For one thing, such a policy likely would overload the Accelerated Docket with cases, threatening the very purpose for which the docket is being considered. Accordingly, CompTel believes that the Docket should initially be limited to issues involving the Act's provisions that attempt to create full and fair competition in the emerging "full service" market. Thus, it should be open to cases involving barriers to entry, interconnection, unbundling or resale obligations, and obligations of the BOCs to provide nondiscriminatory treatment to competing carriers. Specifically, the Accelerated Docket

^{5/} "FCC Creates Local Competition Enforcement Task Force," News Release, July 15, 1997.

should only be open to complaints within the Commission's jurisdiction involving violations of Sections 251, 252, and 271-275 of the Act.⁶⁷

In considering complaints involving violations of Sections 251 and 252, the Commission should coordinate with any state commissions wherever possible. The Commission should require the complaint to identify any state commission proceedings involving substantially similar issues and the FCC should work with the state to address any issues of coordination. To the extent issues involve multiple states, or activities conducted on a multi-state basis, the FCC ordinarily should address the statutory interpretation questions in the first instance. After that initial determination, a state commission should be free to decide issues unique to that state and within its exclusive jurisdiction.

B. Procedural Issues

Provided the case properly qualifies for the Accelerated Docket, participation in the expedited track should be at the complainant's option. Not every complainant will want expedited processing, nor will every case be equally suited to such treatment. In some cases, the expedited procedures necessary to accommodate an Accelerated Docket may threaten a complainant's ability to present its case fairly. Also, the Commission should recognize that the proposed Accelerated Docket imposes many significant burdens on complainants to prepare and prosecute a complaint in an extremely short time period. These burdens may constitute an undue hardship on some complainants, who might prefer the procedures used

⁶⁷ A complainant should be permitted to assert any claims based upon the same transaction or occurrence giving rise to an Accelerated Docket claim. If a given set of facts violates both Sections 251 and 201, for example, it will be most efficient to address all of the parties' arguments in a single proceeding.

for routine complaints. The complainant will be in the best position to determine whether the Accelerated Docket procedures are appropriate to its circumstances. Accordingly, the Commission should give complainant's the choice to "opt-in" to the Accelerated Docket. The complainant should be required to specify in the complaint itself whether regular or accelerated processing is requested.

In order to accommodate the Accelerated Docket's short deadlines, some procedural modifications are appropriate. In this context, it may be necessary to postpone the calculation of damages until after the initial 60-day period is passed. However, if the damage phase is to be postponed in all Accelerated Docket cases, the Commission (1) should address at the status conference the need for and appropriateness of requiring the defendant to deposit sufficient funds into an escrow account to cover the potential damages,^{7/} and (2) should conduct the damages phase immediately after a determination of a carrier's liability and should conclude such phase within 60 days thereafter. Furthermore, the Commission should make greater use of its power to order reimbursement of attorneys' fees in Accelerated Docket cases.^{8/}

Further, the Accelerated Docket will not be able to accommodate investigation into additional matters not raised in the complaint, including most counterclaims. The Accelerated Docket process already includes very short timeframes and depends on the parties' abilities to focus the issues narrowly. Defendants should not be permitted to further tax the Commission's resources, and potentially to confuse the issues to be resolved in the

^{7/} *Complaint R&O*, ¶¶ 206-08

^{8/} *Cf.* 47 U.S.C. § 206 (liability for damages may include "a reasonable counsel or attorney's fee"). Although Section 206 refers to the attorney's fee being set by "the court," CompTel believes that this reference also includes the Commission in cases brought before the FCC.

case, by raising claims with only a tangential connection to the underlying complaint. Thus, the Commission should prohibit counterclaims in Accelerated Docket proceedings, unless the counterclaim arises from the same transaction or occurrence and would itself be eligible for the Docket if brought separately. If these two conditions are met, administrative efficiency would be served by considering the complaint and the counterclaim together.

C. Interim Relief

The *Public Notice* does not discuss what will be one of the most important aspects of many Accelerated Docket cases: the potential for interim relief during the pendency of the proceeding. The Commission clearly has the power to order injunctive relief, whether on a permanent or interim basis. See, *General Telephone Company of California v. FCC*, 413 F.2d 390 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888 (FCC has authority under 47 U.S.C. § 312 to issue cease and desist orders in Title II cases); *Complaint R&O*, ¶ 159 (FCC has authority under Section 4(i) to provide interim relief). This power is of special importance to violations of Section 251, 252 and 271-75 because such violations can threaten a complainant's ability to enter new markets and compete in formerly monopolized markets. A complainant must be provided the opportunity to seek relief or its entire case could be mooted, even under in an accelerated processing environment.

CompTel recommends that any rules adopting an Accelerated Docket for formal complaints contain explicit provisions authorizing interim relief. The complainant should be permitted to request interim relief in the complaint, and should be required to support such request with affidavits or other appropriate evidence. If interim relief is requested, the defendant should be required to respond in the Answer, and the Commission should hold a mini-hearing limited to interim relief within seven (7) days thereafter. The standard to be

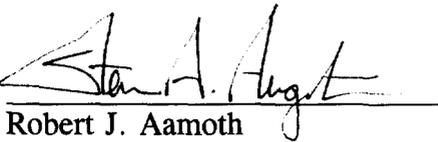
applied in considering requests for interim relief is that commonly used for stay motions, except where the applicable statute provides a different standard.

CONCLUSION

For the foregoing reasons, CompTel recommends that the Commission adopt an Accelerated Docket for the processing of formal complaints alleging violations of Sections 251, 252, and 271-75. The Commission should allow the complainant to choose whether a complaint meeting these criteria is processed through the Accelerated Docket or through the Commission's ordinary processed. In addition, the Commission should prohibit counterclaims unless such claims also meet the Accelerated Docket criteria, and should provide for expedited consideration of requests for interim relief.

Respectfully submitted,

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